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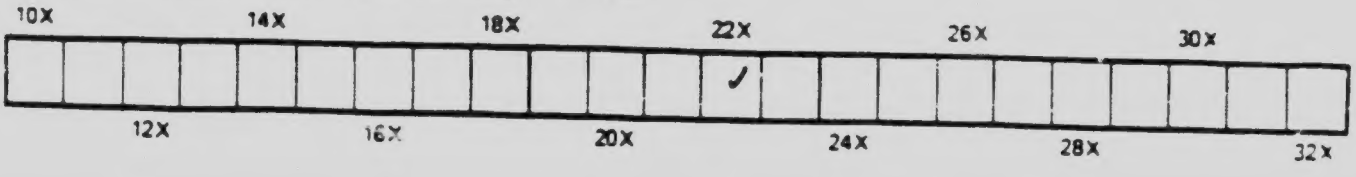

CANADIAN COMPANIES INCORPORATION

And the doctrine of *ultra vires* in the light of

Privy Council Decisions

BY

VICTOR E. MITCHELL, K.C., B.C.L.

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Privy Council Decisions

On the 24th February, 1916, the Privy Council rendered decisions in three very important cases affecting Canadian Constitutional Law in its bearing upon company incorporation in Canada, viz.: *The Bonanza Creek Gold Mining Company Case* (a); The *Insurance Act Reference* (b), and the case involving references *Re Companies Incorporation* (c).

Before proceeding to a review of the above important decisions of the Privy Council, it is desirable to give a retrospect of the principal decisions dealing with the rights and powers of Dominion and Provincial companies respectively, under the British North America Act.

The questions chiefly involved in the controversy centering round sections 91 and 92 of the B.N.A. Act are:

(1) What are the respective rights of the Dominion and of the provinces in respect of the incorporation of companies; and

(2) What are the respective rights and powers of such companies after incorporation under the opposing jurisdictions contained in sections 91 and 92 of the B.N.A. Act?

1. *As to Incorporation of Companies*:

Part VI of the B.N.A Act deals with "Distribution of Legislative Powers."

Sec. 91 of this part deals with "Powers of Parliament."

Sec. 92 deals with "Exclusive Powers of Provincial Legislature."

Sec. 91 contains no express mention of the incorporation of companies by the Dominion Parliament; sec. 92 does contain express mention of "The incorporation of companies

(a) (1916) A.C. 566; 34 W.L.R. 177.
(b) (1916) A.C. 598; 34 W.L.R. 192.
(c) 34 W.L.R. 197.

with provincial objects," and gives the provinces exclusive powers in regard to such incorporation. But sec. 91 says:

> "It shall be lawful for the Queen by and with the consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces."

Hence, the Privy Council has held that the power of legislating with reference to the incorporation of companies with other than provincial objects belongs exclusively to the Dominion Parliament, for the matter is one "not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces," and may be properly regarded as a matter affecting the Dominion generally, and covered by the expression "the peace, order and good government of Canada" *(d)*.

Thus it may be concisely stated:

1. The power of legislating with reference to the incorporation of companies with other than provincial objects belongs exclusively to the Dominion Parliament.
2. The power of legislating with reference to the incorporation of companies with provincial objects belongs exclusively to the provincial legislatures.

In 1883 the important point was established that where a corporation is incorporated by the Dominion Parliament with power to carry on business within the Dominion, the fact that it chooses to confine the exercise of its powers to one province and to local and provincial objects does not operate to render its original incorporation illegal as *ultra vires* of the said Parliament *(e)*. But it would probably be *ultra vires* of the Dominion to incorporate a company formed for the sole purpose of buying a tract of land in a stated province *(f)*.

In 1901 Langelier J. held in *Bank of Toronto vs. St. Lawrence Fire Insurance Company (g)*, that a fire insurance company incorporated in Quebec to carry on the business of fire insurance in that province could enter into

(d) Citizens' Insurance Co. v. Parsons, 7 App. Cas. p. 96, pp. 116-117; Colonial Building & Investment Assn. v. Attorney-General, 9 App. Cas. p. 165; John Deere Plow Co. v. Wharton (1915) A.C. p. 340.
(e) Colonial Building and Investment Assn. v. Attorney-General, 9 App. Cas. 157.
(f) Forsyth v. Bury, 15 S.C.R. 543 per Ritchie and Strong JJ.
(g) Q.R. 19 S.C. 434.

a contract of insurance in that province covering a risk on goods situated in Toronto. The Court of King's Bench (h), though dismissing the action on another ground, unanimously agreed that the fire insurance company had no defence on this ground. On appeal to the Privy Council (i), where the plaintiffs succeeded, the above defence does not appear to have been abandoned, but is referred to apparently in the decision of the Privy Council as one of a number of defences not "seriously argued at the bar." (See per Duff, J., in *Canadian Pacific Ry. Co. vs. Ottawa Fire Insurance Co.* (j), who said:—"Conceding that this case ought not upon this point to be regarded as a decision of the Privy Council, it would at least seem that the eminent counsel who appeared for the insurance company did not think it worth while seriously to challenge the view of the Quebec Courts upon it; and it is obvious that the action must have been dismissed if the defence could have been maintained. This seems to be the only case in which the point has ever been raised.") But it might perhaps have been argued in this case that the insurance company was not exercising its powers in an outside jurisdiction, for the contract was entered into in the province of the company's incorporation, and was of a personal nature, being a contract to indemnify the insured against loss in the event of certain of its property in Ontario (where it was domiciled) being destroyed by fire. Such a contract does not attach to the property insured (k).

In 1906 the Supreme Court of Canada in *Canadian Pacific Ry. Co. vs. Ottawa Fire Ins. Co.* (l), had occasion to determine the meaning of the clause "The incorporation of companies with provincial objects," in its application to a fire insurance company incorporated in Ontario and which had, by a contract entered into within the province of its incorporation, with a company domiciled in another province, insured risks of the latter company in the State of Maine. The majority judges decided that "a company incorporated under the authority of a provincial legislature

(h) Q.R. 11 K.B. 251.
(i) (1903) A.C. 59.
(j) 39 S.C.R. at p. 475.
(k) Saddlers' Company v. Badcock, 2 Atk. 554; Lynch v. Dalzell, 3 Bro. Par Cas. 497; Raynor v. Preston, 18 Ch. D. 1; Vaughan v. Pelletier, Q.R. 15 S.C. 123; See per McLennan, J., in Canadian Pacific Ry. Co. v. Ottawa Fire Ins. Co., 39 S.C.R. at p. 458.
(l) 39 S.C.R. 405.

to carry on the business of fire insurance is not inherently incapable of entering outside the boundaries of its province of origin into a valid contract of insurance relating to property also outside of those limits (per Idington, MacLennan and Duff, J.J.)

The above case was not appealed to the Privy Council but seems to have given an impetus to a movement to have certain stated questions respecting the conflicting claims of the two jurisdictions settled by the higher tribunals. Accordingly, in *Re Companies Incorporation* (m), the Supreme Court of Canada considered these questions. The result of the judgment of the Supreme Court upon the question of interpreting the meaning of the expression "with provincial objects" was thus stated in the decision of the Privy Council in the *Bonanza Creek Case* (n):—"The inpretation of this provision which has been adopted by the majority of the judges in the Supreme Court is that the introduction of the words "with provincial objects" imposes a territorial limit on legislation conferring the power of incorporation so completely that by or under provincial legislation no company can be incorporated with an existence in law that extends beyond the boundaries of the province. Neither directly by the language of a special Act, nor indirectly through bestowal of executive power, do they think that capacity can be given to operate outside the province, or to accept from an outside authority the power of so operating. For the company it is said, is a pure creature of statute, existing only for objects prescribed by the legislature within the area of its authority, and is therefore restricted so far as legal capacity is concerned, on the principle laid down in *Ashbury Railway Co. vs. Riche* (o).

Their Lordships in the *Bonanza Creek Case* rejected the above view as too narrow and said "The words 'legislation in relation to the incorporation of companies with provincial objects' do not preclude the province from keeping alive the power of the executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person. Nor do they appear to preclude the province from legislating so as to create, by or by virtue of statute, a corporation with this general capacity. What

(m) 48 S.C.R. 331.
(n) Supra p. 1.
(o) L.R. 7 H.L. 653.

the words really do is to preclude the grant to such a corporation, whether by legislation or executive act according with the distribution of legislative authority, of powers and rights in respect of objects outside the province, while leaving unobstructed the ability of the corporation, if otherwise adequately called into existence, to accept such powers and rights if granted *ab extra*."

In addition their Lordships in that case dealt with an important phase of charter incorporation and its effect *vis-a-vis* the doctrine of *ultra vires*. This question is discussed at length infra p. 10.

2. *As to conflict of legislative powers under the B.N.A. Act sec.* 91 *and* 92 *in respect of companies, incorporated by the Dominion and the Provinces.*

The power to incorporate companies carries with it the power to confer capacities which are the natural and logical consequences of incorporation (p). The question remains as to how far companies under either jurisdiction can go in the exercise of their powers, rights and duties without interference from the other jurisdiction?

In two cases decided in the year 1894—*Attorney-General of Ontario vs. Attorney-General of Canada* (q), and *Tennant vs. Union Bank of Canada* (r), two propositions were established: First that there can be a domain in which Dominion and Provincial legislation may overlap, in which case neither legislation will be *ultra vires*, if the field is clear; and second, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail (s).

It is now settled that the general authority to make laws for the peace, order and good government of Canada, which the initial part of sec. 91 of the B.N.A. Act confers, does not, unless the subject-matter of legislation falls within some one of the enumerated heads which follow, enable the Dominion Parliament to trench on the subject-matters exclusively entrusted to the Provincial legislatures by the enumeration in sec. 92 (t).

The decision of the Privy Council in *Citizens Insurance*

(p) John Deere Plow Co. v. Wharton (1915) A.C. at p. 344.
(q) (1894) A.C. 189.
(r) (1894) A.C. 31.
(s) See Grand Trunk Ry. Co. c. Attorney-General (1907) A.C. 65; Cie. Hydraulique de St. Francois c. Continental Heat & Light Co. (1909) A.C. 194.
(t) Per Lord Haldane in Insurance Act (1910) Reference, post p. 19.

Company vs. Parsons (u) is one of great importance in relation to the distribution of legislative power under the B.N.A. Act. On the one hand, the Provinces have exclusive jurisdiction in respect of "Property and Civil Rights in the Province" (sec. 92, clause 13). On the other hand, the Dominion has exclusive legislative power over the subject of "The Regulation of Trade and Commerce" (sec. 91, clause 2). Dealing with these two factors in the above case, the Privy Council considered that sections 91 and 92 must, in regard to the classes of subjects generally described in sec. 91, be read together, and the language of one interpreted and, where necessary, modified by that of the other, so as to reconcile the respective powers they contain and give effect to all of them. Each question should be decided as best it can, without entering more largely than is necessary, upon an interpretation of the statute. Hence, the words "property and civil rights in the province" include rights arising from contract (which are not in express terms included under section 91) and are not limited to such rights only as flow from the law, *e.g.*, the status of persons.

The words "regulation of trade and commerce" it was held, include political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of interprovincial concern, and, it may be, general regulation of trade affecting the whole Dominion; but do not include the regulation of the contracts of a particular business or trade, such as, for instance, the busineess of fire insurance in a single province, and therefore do not conflict with the power of property and civil rights conferred by sec. 92.

In the *Insurance Act Reference (v)* their Lordships say "they think as the result of these decisions *(w)* it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces." Nor do the importance and great dimensions of a business alter this rule.

Where a company has been incorporated by the Dominion Government with powers to trade, it is not the less subject to provincial laws of general application enacted

(u) (1881) 7 App. Cas. 96.
(v) L.R. (1916) A.C. 598.

under the powers conferred by sec. 92. Thus, notwithstanding that a Dominion company has capacity to hold land, it cannot refuse to obey the statutes of the province as to mortmain (x); or escape the payment of taxes, even though these may assume the form of requiring as the method of raising a revenue, a license to trade which affects a Dominion company in common with other companies (y). Such a company is also subject to the powers of the province relating to property and civil rights under sec. 92 for the regulation of contracts generally. For instance, a provincial enactment imposing statutory fire conditions to form part of all fire insurance contracts, whether entered into by local or outside insurance companies respecting property within the province, is valid (z).

On the other hand, notwithstanding the above stated provincial jurisdiction, the Privy Council has held in *John Deere Plow Coy. vs. Wharton*, that a province cannot interfere with the status and corporate capacity of a Dominion company in so far as that status and capacity carry with it powers conferred by the Parliament of Canada to carry on business in every part of the Dominion. For instance, a provincial legislature has no power, under the B.N.A. Act, to pass an Act requiring companies incorporated by the Dominion Parliament to be licensed or registered under the Act as a condition of carrying on business in the province or maintaining proceedings in its Courts (a).

This case also decided that the status and powers of a Dominion company as such cannot be destroyed by a provincial legislature. Hence, Part VI of the Companies Act of British Columbia (b) which in effect provides that companies incorporated by the Dominion Parliament shall be licensed or registered under that Act as a condition of carrying on business in the Province or maintaining proceedings in its Courts, is therefore *ultra vires* the Provincial Legislature under the B.N.A. Act. The Privy Council declared that the enactment under discussion was "directed to interfering with the status of Dominion companies, and to preventing them from exercising the powers conferred on them by the

(w) Hodge v. The Queen, 9 App. Cas. 117.
(x) Colonial Building & Investment Assn. v. Attorney-General of Quebec, 9 App. Cas. at p. 164.
(y) Bank of Toronto v. Lambe, 12 App. Cas. 575.
(z) Citizens' Insurance Co. v. Parsons, 7 App. Cas. 96.
(a) (1915) A.C. 330.
(b) R.S.B.C. 1911, c. 39.

Parliament of Canada, dealing with a matter which was not entrusted under sec. 92 to the provincial legislature" (c).

Their Lordships also said in this case "But the expression, civil rights in the province" cannot be so interpreted (*i.e.*, literally), and it must be regarded as excluding cases expressly dealt with elsewhere in the two sections, notwithstanding the generality of the words. If this be so then the power of legislating with reference to the incorporation of companies with other than provincial objects, must belong exclusively to the Dominion Parliament. For the matter is one "not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces," within the meaning of the initial words of sec. 91, and may be properly regarded as a matter affecting the Dominion generally and covered by the expression "the peace, order and good government of Canada" (d). But their Lordships pointed out in *Re Insurance Act* 1910 (e) that the above general authority to make laws for the peace, order and good government of Canada "does not, unless the subject-matter of legislation falls within some one of the enumerated heads which follow, enable the Dominion Parliament to trench on the subject-matters entrusted to the provincial legislatures by the enumeration in sec. 92."

The decision of the Privy Council in the case of *Re Companies Incorporation* is short, as their Lordships state that some of the questions therein propounded were disposed of by their judgments delivered in the cases of *John Deere Plow Coy. vs. Wharton;* the *Bonanza Creek Company Case* and the *Insurance Act Reference.* Also their Lordships point out in their decision the paramount importance of abstaining as far as possible from deciding abstract questions until they come up in actual litigation about concrete disputes.

Even a casual perusal of the *Bonanza Creek Case* will disclose at once that it profoundly modifies the prevailing conception of our law of companies incorporated by letters patent.

The chief point to be borne in mind concerning this Privy Council decision in its relation to the doctrine of *ultra*

(c) (1915) A.C. p. 343.
(d) See also in Citizens v. Parsons, 7 App. Cas. at p. 117.
(e) (1916) A.C. 598.

vires is the fact that it completely upsets all previous notions existing in this country as to the effect of incorporation by letters patent. It has been universally accepted in Canada that the Companies Acts incorporating by letters patent provide for the constitution of a purely statutory company. Such legislation was regarded as a delegation by the Legislature of its power to incorporate, and companies incorporated thereunder as statutory companies, and it was so argued by Mr. Newcombe, the Deputy Minister of Justice. Now the Privy Council in the *Bonanza Creek Case* at one blow literally smashes this all-prevailing conception of our law and declares that to some extent at least our companies incorporated by letters patent derive their existence from the executive power of the Sovereign, and not merely from the words of the regulating statute.

Lord Haldane, in respect of the *Bonanza Creek Company*, incorporated under the Ontario Companies Act, said:

> "The company purports to derive its existence from the act of the Sovereign and not merely from the words of the regulating statute."

Again, in respect of Dominion companies, his Lordship said:

> "The Sovereign, through the medium of the Governor-General, in this way delegates the power of incorporation, subject to restrictions on its exercise, to the Secretary of State, and it is by the exercise of the executive power of the Sovereign that the company is brought into existence."

Also, respecting the Ontario Act:

> "So that, subject to the express restrictions in the statute, it is by the grant under the Great Seal and not by the words of the statute, which merely restrict the cases in which such a grant can be made, that the vitality of the corporation is to be measured."

Their Lordships apparently found an obstacle to their view in the phrase "as if incorporated by a special Act" which occurred in the Canadian statute of 1864. Their Lordships construe this provision as an enabling one, and not as intended to restrict the existence of the company to what can be found in the words of the Act as distinguished

from the letters patent granted in accordance with its provisions.

Possibly this phrase, as it originally occurred, was inserted to emphasize the incorporateness of the corporation, because under the English Letters Patent Act (g), the letters patent did not incorporate (h). But it is to be noted that this phrase may not have the same interpretation in the present Dominion Act, for it is contained in sec. 29 of that Act under the heading "General Powers and Duties of the Company," followed by the additional words "embodying the provisions of this part and of the letters patent and supplementary letters patent issued to such company."

Lord Haldane said, in dealing with the doctrine of *ultra vires:* "The doctrine means simply that it is wrong in answering the question what powers the corporation possesses when incorporated exclusively by statute, to start by assuming that the Legislature meant to create a company with a capacity resembling that of a natural person, such as a corporation created by charter would have at common law, and then ask whether there are words in the statute which take away the incidents of such a corporation. . . . . Such a creature (corporation), where its entire existence is derived from the statute, will have the incidents which the common law would attach, if, but only if, the statute has by its language gone on to attach them. In the absence of such language they are excluded, and if the corporation attempts to act as though they were not, it is doing what is *ultra vires* and so prohibited as lying outside its existence in contemplation of law."

In Canada, hitherto, the doctrine of *ultra vires* has, without exception, been applied to the interpretation of the charters of letters patent companies, as if such companies were incorporated exclusively by statute,—*viz.*, what the letters patent did not grant expressly or by implication was deemed to be prohibited. For instance, in the recent Supreme Court Case of *Union Bank of Canada vs. McKillop and Sons* (i) Idington, J., construing the powers of a company incorporated under the Ontario (letters patent) Companies Act, said: "The powers of the incorporated company must be measured by the express powers given by the Act

(g) 7 Wm. IV. and 1 Vict. c. 73.
(h) See Lindley Companies Vol. 1, p. 139.
(i) 51 S.C.R. at p. 521.

of incorporation and such necessarily implied powers as the general purview of the statute demonstrates were intended to be covered by the expressions used in the statute." Again at p. 522: "I think the corporation not only has no powers beyond that so given it, but must assert such power as it may have been given by the method through and by which it is enabled to act, and when going beyond such limits its acts are *ultra vires* and void." Duff, J., said (j): "The contract upon which the action is brought is not within the objects defined by the letters patent either expressly or by implication."

The fundamental difference between chartered companies and others is thus pointed out in Palmer's Company Law, 6th Edit., p. 5: "There still, however, subsists a difference of a fundamental character between a chartered company and a company formed under a special Act or registered under the Companies Acts, and it is this: at common law a corporation created by the King's charter has power, as was determined in the *Sutton Hospital Case* (k), to deal with its property, to bind itself by contracts, and to do all such acts as an ordinary person can do, and so complete is this corporate autonomy that it is unaffected even by a direction contained in the creating charter in limitation of the corporate powers. For the common law has always held that such a direction of the Crown—though it may give the Crown a right to annul the charter if the direction is disregarded—cannot derogate from that plenary capacity with which the common law endorses the company, even though the limitation is an essential part of the so-called bargain between the Crown and the corporation (l). This feature —the unrestricted corporate capacity of the chartered company—is in marked contrast to the strict delimitation by the Legislature and the Courts of the statutory or registered company to its defined objects."

Mr. Machen points out (m) that though in England in modern times, the notion has obtained credence that a corporation incorporated by Royal charter is bound by all its contracts, even though *ultra vires*, to the same extent as an individual would be, subject to its being dissolved at the

(j) At p. 524.
(k) 10 Rep. 13.
(l) See judgment of Bowen L.J. in Baroness Wenlock v. River Dee Co. 36 Ch. D. 685 and of Blackburn J. in Riche v. Ashbury Rail. Co. L.R. 9 Ex. p. 263.
(m) Secs. 1022-1025.

suit of the Attorney-General, if it engages in *ultra vires* transactions (citing Palmer, *inter alia*)—yet there is very little, if anything, in the decisions to support such a contention.

It is pointed out by Mr. Machen that in the *Sutton Hospital Case* (n) there was nothing to indicate that a contract wholly beyond the scope of the purposes of the charter would have been binding.

In 1851, in *Copper Miners Co. vs. Fox* (o), where the company was incorporated by charter of the Crown to trade in copper, it was held that the corporation could not maintain an action of assumpsit on a parol contract for sale of iron. The case turned upon the question of contracts under seal and parol contracts, but Lord Campbell stated "It is unnecessary for us to consider whether the company could sue or be sued in this case, even if the contract had been by deed."

In the case of *Ayers vs. South Australian Banking Co.* (p), decided in 1871, a few years before the doctrine of *ultra vires* was finally established in *Ashbury Rly. Co. vs. Riche* (1874), the charter contained a clause which said it shall not be lawful for the bank to make advances on merchandise. In alluding to that clause, Lord Justice Mellish said (q): "Now, unquestionably, a great many questions might be raised on the effect of that clause in the charter which may be of very great importance, but which also being of difficulty, their Lordships do not think it necessary to give any opinion upon. There may be a considerable question as to what are the transactions which come really within the clause, and whether this particular case does come within it. There may be also a question whether, under any circumstances, the effect of violating such a provision is more than this, that the Crown may take advantage of it as a forfeiture of the charter; but the point which it appears to their Lordships is necessary to be determined in the present case is this, that whatever effect such a clause may have, it does not prevent property passing, either in goods or in lands, under a conveyance or instrument which under the ordinary circumstances of the law would pass it."

(n) 10 Co. 1.
(o) 16 Q.B. 229.
(p) L.R. 3 P.C. 548, 40 L.J.P.C. 22.
(q) 40 L.J.P.C. at p. 26.

In 1883 Lord Bowen said, in *Baroness Wenlock vs. River Dee* (r): "A corporation created by the King's charter has, *prima facie*,—and has been known to have ever since *Sutton Hospital Case* (s)—the power to do with its property all such acts as an ordinary person can do, and to bind itself to such contracts as an ordinary person can bind himself to."

Coming now to the case of *Bonanza Creek Co.*, their Lordships say: "In the case of a company created by charter the doctrine of *ultra vires* has no real application in the absence of statutory restriction added to what is written in the charter. Such a company has the capacity of a natural person to acquire powers and rights. If by the terms of the charter it is prohibited from doing so, a violation of this provision is an act not beyond its capacity, and is therefore not *ultra vires*, although such a violation may well give grounds for proceedings by way of *scire facias* for the forfeiture of the charter."

But the interesting question arises—is a company incorporated under one of our Letters Patent Acts solely and exclusively a prerogative company? That question, it is submitted, should be answered in the negative, for such a company is in reality partly a prerogative company and partly a statutory company. The reason it cannot be regarded as entirely a prerogative company is because certain powers are conferred upon it by the statute, which the Crown, without statutory authority, could not confer. For instance, the Crown cannot create a corporation and give it the right to make calls on the shareholders; nor can the Crown make the shareholders liable for the debts of the corporation. Those are two very important powers which the Crown cannot give. Authority for that statement is to be found in a Court of Appeal decision rendered by Lord Lindley, in the case of *Elve vs. Boynton* (t). In this case, the company, "The London Assurance," was created by Royal Charter granted in pursuance of an Act of Parliament with rights and privileges which the Crown could not have granted without statutory sanction. It was held that the company was a company incorporated by Act of Parliament within the meaning of a power to a trustee by will to invest in the shares of any company incorporated by Act of Parliament. Lord Lindley said:

"It was not in the power of the Crown so to incorporate

(r) 36 Ch. D. 685.
(s) *Supra.*
(t) 1891, 1 Chancery 501.

"these persons as to make them liable to any extent for the "debts of the corporation. . . . It (the Act) empowered the "Crown to grant a charter of incorporation to persons who "should be liable to calls among other things, which the "Crown could not do apart from the Act. And it was pursu- "ant to the provisions of that Act that the Crown granted "a charter and incorporated in the narrow sense this London "Assurance."

"Stopping there, let us ask ourselves whether such a "corporation so created is not, in the language of the Will, "incorporated by Act of Parliament. It is said No; it is "incorporated by charter. The answer is, it would have been "impossible without the Act of Parliament to have created "such a corporation by that charter or any other charter. "The truth is, looking at the matter in the most narrow "sense, that this corporation owed its birth and creation "to the joint effect of the charter and the Act of Parliament, "and you can no more neglect the Act of Parliament than "you can neglect the charter. It appears to us that this "corporation was a company incorporated by Act of Parlia- "ment within the true meaning of the investment clause."

That is exactly the position of companies incorporated under our Letters Patent Acts,—they owe their birth and creation to the joint effect of the charter granted by the Crown and the Act of the Legislature under which they were incorporated, and you can no more neglect the Act of the Legislature than you can neglect the charter. Such companies must, therefore, in respect of certain of their powers, rights and privileges, be regarded as statutory companies, and in respect of others, as prerogative companies. If this view is correct, then the doctrine of *ultra vires* applies to any act which is not within the scope of the powers with which companies incorporated by letters patent are vested by virtue of the statute, but does not apply to acts which are beyond or outside the powers which such companies are deemed to possess by virtue of their incorporation by act of the Sovereign through the designated official, and not by or under the statute. But even granting that, the further interesting question arises as to whether not the doctrine of *ultra vires* would apply to acts which are beyond or outside the powers conferred upon the company by the letters patent. Some eminent Canadian

lawyers are of opinion that the effect of the judgment rendered by the Privy Council in the *Bonanza Creek Case* is that a company incorporated under a Letters Patent Act is not restricted to the powers or objects mentioned in the Letters Patent, and that, if it engages in any business not authorized by its charter, the only penalty is that the Crown can take proceedings by way of *scire facias* to have the charter forfeited. It is respectfully submitted that that is not the effect of the language used by Lord Haldane in rendering the decision of the Privy Council. As regards the application of the doctrine of *ultra vires* to letters patent companies, Lord Haldane uses very careful and significant language. He says, "In the case of a company created by charter, the doctrine of *ultra vires* has no real application in the absence of statutory restriction added to what is written in the charter." Do not these words "in the absence of statutory restriction added to what is written in the charter" mean that, if there is a statutory restriction, the doctrine of *ultra vires* would apply? This leads us to question whether there is any statutory restriction in respect of the purposes and objects for which a company is incorporated under the letters patent acts. The Secretary of State under the Dominion Act and the Lieutenant-Governor under the Ontario Act is given the right to incorporate companies for any of the purposes or objects to which the authority of their respective Legislatures extends. Once the Letters Patent have been granted, these objects and purposes cannot be extended except by supplementary letters patent, and the application therefor must be authorized by a resolution passed by the votes of shareholders representing at least two-thirds in value of the subscribed stock of the company at a special general meeting called for the purpose. These provisions of the Acts, it is submitted, constitute statutory restrictions within the dictum laid down by Lord Haldane, and prohibit a company from enlarging its purposes and objects as stated in the Letters Patent without complying with the conditions laid down by the Acts. If that is so, the doctrine of *ultra vires* would apply under the principles laid down in *Ashbury vs. Riche*. This conclusion is not repugnant to the dictum of Lord Haldane, because he simply says that the doctrine of *ultra vires* has no real application in the absence of statutory restrictions.

It must also be remembered in applying the *Bonanza Creek* decision, what the point at issue was in that case. It was whether or not a company had the capacity to take power from some other jurisdiction to carry on the business which it was, under its letters patent, authorized to carry on.

On this issue the Privy Council held that at the time of Confederation the Crown, acting through the Lieutenant-Governor of the Province of Ontario, had power to incorporate companies with Provincial objects, but with an ambit of vitality wider than that of the limits of the Province; but, as Lord Haldane said, such Provincial objects would be, of course, the only objects in respect of which the Province could confer actual rights. Rights outside the Province would have to be derived from authorities outside the Province.

Lord Haldane further says: "The limitations of the legislative powers of a Province expressed in Section 92 (B.N.A.A.), and in particular the limitations of the power of legislation to such as relates to the incorporation of companies with Provincial objects, confine the character of the actual powers and rights which the Provincial Government can bestow, either by legislation or through the Executive, to powers and rights exercisable within the Province. But actual powers and rights are one thing and capacity to accept extra-provincial powers and rights is quite another." Now, what is meant by "capacity to accept extra-provincial powers and rights"?

Commenting on the provisions of section 9 of the Ontario Act, which corresponds to Section 5 of the Dominion Act, the Privy Council say that "*subject to the express restrictions in the statute*, it is by the grant under the Great Seal and not by the words of the statute, which merely restricts the cases in which such a grant could be made, that the vitality of the corporation is to be measured," and further, that "if validly granted, the Charter under the Great Seal confers on the company a status resembling that of a corporation at common law, *subject to the restrictions which are imposed on its proceedings.*"

Applying this principle, Lord Haldane says: "There is nothing in the language used (in the statute) which, for instance, would preclude such a company from having an office or branch in England or elsewhere outside Canada."

His Lordship further says: "The words 'legislation in relation to the incorporation of companies with Provincial objects' do not preclude the Province from keeping alive the powers of the Executive to incorporate by Charter in a fashion which confers a general capacity analogous to that of a natural person. Nor do they appear to preclude the Province from legislation so as to create by, or by virtue of a statute, a corporation with this general capacity. What the words really do is to preclude the grant to such a corporation, whether by legislation or by Executive Act according to the distribution of legislative authority, of powers and rights in respect of objects outside the Province while leaving untouched the ability of the corporation, if otherwise adequately called into existence, to accept such powers and rights if granted *ab extra*. It is, in their Lordships' opinion, in this narrower sense alone that the restriction to Provincial objects is to be interpreted. It follows, as the Ontario Legislature has not thought fit to restrict the exercise by the Lieutenant-Governor of the prerogative power to incorporate by Letters Patent with the result of conferring a capacity analogous to that of a natural person, that the appellant could accept powers and rights conferred on it by outside authorities." Their Lordships of the Privy Council, therefore, arrived at the conclusion that the Bonanza Creek Gold Mining Company had a status which enabled it to accept from the Dominion authorities the right of free mining and to hold the leases in question and take the benefits of the agreement relating to the location of the Yukon District, as well as the license from the Yukon authorities.

Their Lordships found that the power of the Crown to endow the company with the general capacity to accept the power or right to carry on its business beyond the territorial limits of the Province had not been in any way restricted either by the B.N.A. Act or by the Ontario statute, and, consequently, the company had such general capacity in virtue of the Letters Patent issued to it by the Lieutenant-Governor under the Great Seal of Ontario. The capacity to accept powers and rights *ab extra* does not mean, it is submitted, that the company can be authorized *ab extra* to carry on a business different from that which it is authorized to carry on under the Letters Patent and which, under the terms of the statute, cannot be changed or enlarged ex-

cept by supplementary letters patent. A company incorporated under the Ontario Act or under any of our Letters Patent Acts is, it is submitted, restricted by the terms of such Acts to the particular business which it is authorized to carry on by the letters patent issued thereunder.

Can it be reasonably contended that a company incorporated under the Ontario Act as a soap company can go into another province and take power to carry on a brewery business? It is submitted that such a company, notwithstanding that its charter is derived from the Crown, has only the capacity to take from another province or jurisdiction the right to carry on outside the Province in which it is incorporated the business or objects to which it is restricted by the terms of the Act under which its letters patent are granted.

There is nothing in the decision of the Privy Council which implies that such a company could carry on any other business, either in the Province or elsewhere, unless and until it has fulfilled the conditions imposed by the Act, *viz.*, obtained authority so to do from its shareholders and confirmation thereof by the grant of supplementary letters patent. In other words, the power of the Crown to limit or extend the objects and purposes set forth in the letters patent incorporating the company can only be exercised in the manner and subject to the conditions prescribed by the Act. The power of the Crown is similarly limited in respect of the increase or decrease of the capital stock of the company. These provisions of the Act constitute, in the author's opinion, statutory restrictions upon the Crown's prerogative and must be regarded, to use Lord Haldane's own words, as "added to what is written in the charter or letters patent."

It is submitted that the foregoing views are quite consistent with the dicta laid down by the Privy Council in the *Bonanza Creek Case* and if this be so, then the doctrine of *ultra vires* would still apply to any violation of the provisions of the letters patent in respect to the purposes and objects for which the company is incorporated—in other words, if the company does acts not within the purposes and objects set forth in its letters patent, or reasonably incidental thereto, the doctrine of *ultra vires* would apply and such acts would be absolutely null and void.

RE INSURANCE ACT 1910.

This case (u) needs no further special reference than has already been made to it, except as to one point which should be noted. Counsel for the Dominion had sought to bring the subject of the regulation of insurance within the scope of the Dominion's powers relating to the regulation of trade and commerce, on the ground of the enormous magnitude of the business of insurance. But their Lordships pointed out that "Where the British North America Act has taken such forms of business out of provincial jurisdiction, as in the case of banking, it has done so by express words which would have been unnecessary had the argument for the Dominion Government addressed to the Board from the Bar been well-founded."

VICTOR E. MITCHELL.

Montreal, March 10th, 1917.

(u) (1916) A.C. 598.